2 3 4 5 6 7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN 8 TIMOTHY BORDERS, et al., 9 No. 05-2-00027-3 Petitioners, 10 11 KING COUNTY AND DEAN LOGAN, its Director of Records, Elections and Licensing 12 Services, et al., 13 Respondents, 14 V. WASHINGTON STATE DEMOCRATIC 15 CENTRAL COMMITTEE, 16 Intervenor-Respondent, 17 ν. LIBERTARIAN PARTY OF WASHINGTON 18 STATE, et al., 19 Intervenor-Respondents. 20

PETITIONERS' RESPONSE TO WSDCC'S MOTION IN LIMINE

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Davis Wright Tremaine LLP LAW OFFICES 2600 Century Square · 1501 Fourth Avenue Seattle, Washington 98101-1688 (206) 622-3150 · Fax: (206) 628-7699

#### I. INTRODUCTION

WSDCC has brought a motion in limine to exclude any testimony relating to what it calls "undisclosed" claims regarding absentee ballots. The motion is without merit. Petitioners met the Court's schedule for identifying, by April 15, the votes being contested, including the identification of an approximate number of absentee ballots which, based on the incomplete evidence available, were believed to have been counted in excess of the number of lawfully registered absentee voters who voted.

### II. FACTS

#### A. Absentee Ballots

Petition. WSDCC has been on notice since this Election Contest was filed that Petitioners were alleging more votes counted than voters who actually voted. Bowman Decl. ¶ 1. In the original contest petition, Petitioners stated: "Many, potentially thousands, more votes were counted than were cast by lawfully registered voters." Election Contest Petition § VI(B)(1). The supporting Affidavit of Chris Vance states: "Many, potentially thousands, more votes were counted than were cast by lawfully registered voters." Vance Affidavit ¶ 6(a).

April 15 disclosure. In April 15 disclosure, Petitioners disclosed a claim that there were 313 absentee ballots in excess of voters. *See* Exhibit 10 to Declaration of David Bowman dated April 15, 2005. This was the closest estimate, based on incomplete information, that Petitioners could make at the time. Petitioners did not learn until the depositions of King County officials, and from records received on or after April 15, 2005 from King County, the extent of the excess absentee ballot issue. Bowman Decl. ¶ 2.

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Depositions Permitted Only After April 15. Petitioners sought depositions from King County officials as early as possible, but the Court granted a protective order that set the depositions of Dean Logan and Bill Huennekens for the week after April 15. Petitioners asked at the time that they be allowed to update their list based on what was disclosed in discovery. The Court said that Petitioners could raise the issue. Bowman Decl. ¶ 3.

King County Produces Absentee Ballot Information. On April 15, King County produced absentee ballot reconciliation information to Petitioners, in the form of a CD entitled "AV Tape 11/04" and two spreadsheets with attachments. Bowman Decl. ¶ 4. Petitioners had no opportunity to question a King County official regarding this information until April 18. Bowman Decl. ¶ 4.

Depositions Disclose Critical Facts. On April 18, the earliest date permitted by the Court, deposition testimony of King County employees began. Petitioners and WSDCC inquired of several witnesses regarding the absentee ballot discrepancy issue. Petitioners questioned Bill Huennekens, King County Superintendent of Elections, regarding the issue. Bowman Decl. ¶ 5. See, e.g., Huennekens Dep. 75:1-25. Counsel for Petitioners and WSDCC also questioned Garth Fell and Nicole Way in their depositions. Bowman Decl. ¶ 5. See Fell Dep. Exs. 14, 15, and 16; Fell Dep. 253:8-256:4; 284:10-285:22; 324:21-325:20; Way Dep. 72:1-76:6; 83:24-85:2; 89:8-94:18.

The depositions quantified the number of ballots associated with the issue that had been previously disclosed. Although none of the witnesses were able to identify the amount of the discrepancy, they acknowledged that there was one that could not be resolved and provided Petitioners in the Nicole Way deposition, for the first time, the

correct number of individuals in the Federal Write In Ballot and Address Confidentiality Program. Those are individuals who cast ballots that were counted but who are not credited with voting. Way Dep. 32:22-36:23. Until Petitioners knew the exact number of absentee ballots in these categories, something Petitioners asked numerous witnesses but only Ms. Way was able to answer authoritatively, Petitioners did not know how much of the discrepancy was as a result of individuals in those programs. After Petitioners learned the number from Ms. Way, Petitioners determined that the remaining unaccounted for discrepancy was 875. This is how Petitioners arrived at the updated number of 875 that is in the trial brief—nothing more than the exact same claim that Petitioners disclosed in the April 15 disclosure, updated with the information received since that date. Bowman Decl. ¶ 6.

WSDCC was present at all of the depositions and heard the questions about absentee crediting and about this issue. They even examined some witnesses on the subject -- including Clark Bensen. Bowman Decl. ¶ 7; Benson Dep. 70:10-75:12.

**Petitioners' 30(b)(6) Subpoena to King County.** On May 11, 2005, Petitioners issued a 30(b)(6) subpoena to King County Division of Records, Elections and Licensing Services specifically indicating that the following matters would be examined in the deposition:

- the reconciliation and the number of discrepancies in the reconciliation of poll site, provisional, and absentee ballots;
- the number of federal write-in ballots issued, returned by voters, and the
   crediting process with respect to those voters;

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- number of individuals in the address confidentiality program and the crediting process with respect to those voters;
- the number of absentee ballots issued to voters, returned by voters,
   processed by PSI, accounted for by verifiers, openers, and tabulators;
- the process of crediting absentee voters and any discrepancy between the number of individuals credited with voting absentee and the number of absentee ballots tabulated.

See Bowman Decl. ¶ 8. These topics for the King 30(b)(6) specifically addressed the absentee ballot discrepancy issue. Clearly this was a topic Petitioners were pursuing. Id.

### III. ARGUMENT

A. Petitioners Met the Court's Disclosure Requirements with Respect to Excess Absentee Ballots.

It would be inequitable to hold that Petitioners had to have their case completed on April 15 yet not permit Petitioners to take key depositions until after April 15. The inequities are compounded if WSDCC is permitted to bring in evidence they learned in the depositions that generated new claims of offsetting errors while Petitioners are not.

WSDCC's argument would be the same on these issues if they had been disclosed on April 16 as disclosed in depositions. It simply makes no sense.

WSDCC's argument that voter names must be identified ignores the Court's order, at section (i), in which the Court requires the list of votes contested to include "*To the extent known*, the name, address, voter registration number, and date of birth of the person casting the vote" (emphasis added). There are no names associated with the absentee discrepancy. That is the very problem. King has counted 875 ballots they can't tie to a

registered voter. It cannot be that the election contest statute prohibits litigating the classic ballot box stuffing scenario. In addition, errors and misconduct under .011 and .020(1) are different from illegal votes under .020(5). There is no requirement in the statute to disclose names associated with ballots that were counted as a result of .011 or .020(1) errors and misconduct.

With respect to the number of absentee ballots identified, evidence regarding an 875 vote discrepancy and a 300 discrepancy (which was expressly disclosed with respect to absentees) is the same. Entering an order that precludes Petitioners from presenting evidence of the 875 would be the same as precluding Petitioners from presenting evidence of the 300 that were specifically identified on April 15, and vice versa.

# B. Petitioners Met the Court's Disclosure Requirements with Respect to Excess Poll Ballots.

Petitioners were required by the court's scheduling order to make disclosures on April 15. Petitioners made that disclosure with as much clarity as the evidence makes possible. *See* Decl. of David Bowman, dated April 15, 2005, Ex. 7, identifying the precincts in which excess votes were counted, and the number of excess votes counted in each precinct.

### IV. CONCLUSION

This is a bench trial. The Court can accept the evidence and give it the weight that the Court thinks is due. For all of the reasons stated herein, WSDCC's Motion in Limine should be denied.

Attorneys for Petitioners

Davis Wright Tremaine LLP

Harry J. F. Korrell, WSBA #23173 Robert J. Maguire, WSBA #29909

No. 05-00027-3

**DECLARATION OF** 

DAVID BOWMAN

Timothy Borders, et al.,

# IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN

Petitioners,

V.

King County and Dean Logan, its Director of Records, Elections and Licensing Services, et al.,)

Respondents,

V.

Washington State Democratic Central Committee,

Intervenor-Respondent,

V.

Libertarian Party of Washington State et al.,

Intervenor-Respondents.

## DAVID BOWMAN declares as follows:

I am an attorney at Davis Wright Tremaine LLP, attorneys of record for Timothy Borders, et al. ("Petitioners"). I make the statements in this Declaration based on personal knowledge, and if called and sworn as a witness in any proceeding, could and would testify competently thereto.

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- WSDCC has been on notice since this Election Contest was filed that 1. Petitioners were alleging more votes counted than voters who actually voted. In the original contest petition, Petitioners stated: "Many, potentially thousands, more votes were counted than were cast by lawfully registered voters." Election Contest Petition § VI(B)(1). The supporting Affidavit of Chris Vance states: "Many, potentially thousands, more votes were counted than were cast by lawfully registered voters." Vance Affidavit  $\P$  6(a).
- In April 15 disclosure, we included 313 absentee ballots in excess of 2. voters. See Exhibit 10 to Declaration of David Bowman dated April 15, 2005. This was the closest estimate, based on incomplete information, that Petitioners could make at the time. Petitioners did not learn until the depositions of King County officials, and from records received on April 15 from King County, the extent of the excess absentee ballot issue.
- 3. Petitioners sought depositions from King County officials as early as possible, but the Court granted a protective order that set the depositions of Dean Logan and Bill Huennekens for the week after April 15. Petitioners asked at the time that they be allowed to update their list based on what was disclosed in discovery. The Court said that Petitioners could raise the issue.
- On April 15, King County produced absentee ballot reconciliation information to Petitioners, in the form of a CD entitled "AV Tape 11/04" and two spreadsheets with attachments. Attached as Exhibit 1 to this Declaration is a true and correct photocopy of the CD, and the two spreadsheets. Petitioners had no opportunity to question a King County official regarding this information until April 18.
- 5. On April 18, the earliest date permitted by the Court, deposition testimony of King County employees began. Petitioners and WSDCC inquired of several witnesses

DECLARATION OF DAVID BOWMAN - 2

regarding the absentee ballot discrepancy issue. Petitioners questioned Bill Huennekens, King County Superintendent of Elections, regarding the issue. Attached as Exhibit 2 to this Declaration is the following true and correct excerpt from the deposition of Bill Huennekens: Huennekens Dep. 75:1-25. Counsel for Petitioners and WSDCC also questioned Garth Fell and Nicole Way in their depositions. Attached as Exhibit 3 to this Declaration are the following true and correct excerpts from the depositions of Garth Fell and Nicole Way: Fell Dep. 253:8-256:4; 284:10-285:22; 324:21-325:20; Way Dep. 32:22-36:23; 72:1-76:6; 83:24-85:2; 89:8-94:18.

- that had been previously disclosed. Although none of the witnesses were able to identify the amount of the discrepancy, they acknowledged that there was one that could not be resolved and provided Petitioners in the Nicole Way deposition, for the first time, the correct number of individuals in the Federal Write In Ballot and Address Confidentiality Program. Those are individuals who cast ballots that were counted but who are not credited with voting. *See* Way Dep. 32:22-36:23. Until Petitioners knew the exact number, something Petitioners asked numerous witnesses but only Ms. Way was able to answer authoritatively, Petitioners did not know how much of the discrepancy was as a result of individuals in those programs. After Petitioners learned the number from Ms. Way, Petitioners determined that the remaining unaccounted for discrepancy was 875. This is how Petitioners arrived at the updated number of 875 that is in the trial brief—nothing more than the exact same claim that Petitioners disclosed in the April 15 disclosure, updated with the information received since that date.
- 7. WSDCC was present at all of the depositions and heard the questions about absentee crediting and about this issue. They even examined some witnesses on the subject -- including Clark Bensen. Attached as Exhibit 5 to this Declaration is the

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following true and correct excerpt from the Deposition of Clark Benson: Benson Dep. 70:10-75:12.

- 8. On May 11, 2005, Petitioners issued a 30(b)(6) subpoena to King County Division of Records, Elections and Licensing Services specifically indicating that the following matters would be examined in the deposition:
  - the reconciliation and the number of discrepancies in the reconciliation of poll site, provisional, and absentee ballots;
  - the number of federal write-in ballots issued, returned by voters, and the crediting process with respect to those voters;
  - number of individuals in the address confidentiality program and the crediting process with respect to those voters;
  - the number of absentee ballots issued to voters, returned by voters, processed by PSI, accounted for by verifiers, openers, and tabulators;
  - the process of crediting absentee voters and any discrepancy between the number of individuals credited with voting absentee and the number of absentee ballots tabulated.

These topics for the King 30(b)(6) specifically addressed the absentee ballot discrepancy issue. Clearly this was a topic Petitioners were pursuing.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 23rd day of May, 2005.